Supreme Court, U. S.
FILED
AUG 4 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-191

FRANK L. PETERMAN,
Petitioner,

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit

LLOYD E. HUMPHREYS
HUMPHREYS & WARNER
809 Merchants National Bank
Cedar Rapids, Iowa 52401

W. HOWARD SMITH
Attorney at Law
330 First Street SE
P. O. Box 4708
Cedar Rapids, Iowa 52407
Attorneys for Petitioner

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

INDEX

Page

Prayer 1

Opinion below 2

Jurisdiction 2

Questions presented for review 4

Statutory provisions involved 4

Statement of the case 4

Reasons for granting the writ 6

Conclusion 9

Appendix A—Opinion of United States Court of Appeals for the Eighth Circuit A-1

Appendix B—Order denying petition for rehearing A-13

Appendix C—Reply Brief of appellant A-14

Case Cited

Peterman v. Chicago, Rock Island and Pacific Railroad Company, 493 F2d 88 ..... 2, 6

Statutes and Rules Cited

Federal Rules of Appellate Procedure:

Rule 4 ..... 4, 7

Rule 41 ..... 4, 7

Rule 45 ..... 4, 7

Federal Rules of Civil Procedure:

Rule 50 .....3, 4, 5, 7, 8

Rule 51 .....3, 4, 8

Rule 60 7

Rule 69 4

28 U.S.C. §1254 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. .....

FRANK L. PETERMAN,
Petitioner,

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Frank L. Peterman, Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above case on May 6, 1975.

OPINIONS BELOW

The judgment of the District Court of the United States for the Southern District of Iowa, based upon jury verdict in favor of Peterman was originally rendered on or about July 19, 1973. The trial court on its own Motion on or about October 9, 1973, set the judgment in favor of the Petitioner aside. The United States Court of Appeals for the Eighth Circuit by way of Writ of Mandamus held the trial court acted without jurisdiction and set aside the order of the trial court and reinstated the judgment on jury verdict. (See printed opinion *Peterman v. Chicago, Rock Island and Pacific Railroad Company*, 493 F2d 88). Petition by the Railroad for Writ of Certiorari to the United States Supreme Court was denied on or about June 10, 1974.

On March 15, 1974, mandate issued from the Circuit Court of Appeals, in the form of a certified copy of its judgment and its opinion holding the trial court exceeded its jurisdiction in granting a new trial, and ordered reinstatement of the judgment rendered on the jury verdict on July 19, 1973. The mandate was recorded in the trial court and notice issued to counsel on June 19, 1974.

The Respondent appealed on August 2, 1974. Petitioner filed a Motion to Dismiss for untimely appeal. The opinion of the United States Court of Appeals for the Eighth Circuit (unreported) overruling the Motion to Dismiss, setting aside the original jury verdict and granting a new trial is printed in Appendix A, pages A-1-A-12.

JURISDICTION

The Judgment of the United States Court of Appeals for the Eighth Circuit in this second appeal was entered May 6, 1975. A timely Petition for Rehearing was filed, and Petition for Rehearing was denied May 28, 1975 (Appendix B infra, page A-13). The jurisdiction of this Court is conferred under 28 USC § 1254. Review by this Court of the decision of the Court of Appeals for the Eighth Circuit is required because:

(a) The Court of Appeals for the Eighth Circuit has rendered a decision in conflict with other courts of appeals on the same matter; in conflict with the applicable decisions of this Court, and has departed from the accepted and usual course or judicial proceedings in such a manner as to warrant the exercise of this Court's power of supervision; in that it allowed a civil appeal to it after the time for appeal expired, without an extension of time, and after one (1) year from the judgment of the trial court, citing criminal cases which are not applicable here. (See decision Appendix A infra, pages A-1-A-12).

(b) The Court of Appeals for the Eighth Circuit has decided an important question of federal law which is in direct conflict with Federal Rule of Civil Procedure 50(d) in that it cites that Rule as authority for granting an "Appellant" a new trial when the plain words of the Rule limit such relief to the "Appellee".

(c) The Court of Appeals for the Eighth Circuit has rendered a decision in conflict with applicable decisions of this Court and other courts of appeals, and has departed so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision by finding as a ground for a new trial an instruction that was not objected to by Appellant Railroad, contrary to Federal Rule of Civil Procedure 51.

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are as follows:

(1) Can an Appellant appeal from a civil judgment after the time for appeal expired, without an extension of time, and without good cause shown?

(2) When is the mandate of a Circuit Court of Appeals effective?

(3) Can the Circuit Court of Appeals under FRCP 50(d) grant an Appellant rather than Appellee a new trial?

(4) Whether criminal cases in which the Clerk accepted Notices of Appeal after the time for appeal expired are authority to allow a delinquent civil appeal.

(5) Can a Circuit Court on its own motion, assign as error, the giving of an instruction not objected to by a party?

STATUTORY PROVISIONS INVOLVED

FRAP 4(A), 41, 45

FRCP 50(d), 51, 69(b)

STATEMENT OF THE CASE

This case was tried in the United States District Court for the Southern District of Iowa, Davenport Division, and resulted in a jury verdict for the Plaintiff-Petitioner Frank L. Peterman, in the amount of $35,000.00 on July 19, 1973. On October 9, 1973, the Court overruled Defendant's Motion for Judgment NOV finding there was sufficient evidence to submit the issue of Last Clear Chance to the jury. The Court then on its own motion, after the ten day period therefor, granted a new trial, assigning allegedly confusing interrogatories.

The Petitioner took a Writ of Mandamus action to the Circuit Court of Appeals on the grounds that the trial court acted beyond its jurisdiction and authority in granting a new trial. The Circuit Court on March 15, 1974, granted the Writ of Mandamus and vacated the Order of the trial court as a void Order without jurisdiction or authority.

The Respondent-Railroad, petitioned for Certiorari to the United States Supreme Court. The United States Supreme Court denied Certiorari on or about June 10, 1974. On June 19, 1974, the trial court,

> "—filed Judgment Mandate Vacating New Trial Order and Reinstating the Judgment on the Verdict, assessing costs to the Respondent and notifying counsel."

On July 24, 1974, the Respondent-Railroad filed a "Motion for Entry of Judgment and in the Alternative for an Extension of Time for Filing Notice of Appeal", not stating any recognized grounds to extend time under the FRCP. The trial court, without hearing or notice, entered an "Order Reinstating Judgment Entered July 19, 1973" on July 25, 1974. The Respondent-Railroad filed a Notice of Appeal on August 2, 1974. (One year and two weeks after judgment on the verdict and 44 days after mandate of the Circuit Court was recorded in the trial court).

The Circuit Court of Appeals overruled a Motion to Dismiss the appeal by Petitioner, citing two criminal cases which held that the Clerk of Court by accepting Notices of Appeal waives the time limit to appeal. It granted a new trial to Appellant on or about May 6, 1975, citing as authority FRCP 50(d) and assigned as error an instruction that was not objected to by the parties.

A timely Petition for Rehearing before the Court of Appeals was overruled on or about May 28, 1975.

REASONS FOR GRANTING THE WRIT

How many months or years as in this case, does a Defendant-Railroad have in which to appeal?

The Notice of Appeal upon which Defendant-Respondent relies was filed August 2, 1974, although its Motion for Judgment NOV was overruled by the trial court on October 9, 1973, the trial court ordering on its own motion, a new trial. In the meantime of course, this Plaintiff successfully sought and obtained a Writ of Mandamus from the Eighth Circuit Court of Appeals: the holding being that the action of the trial court was void and without jurisdiction when it entered sua sponte an Order for a new trial. That Order was entered by the Court of Appeals in March, 1974, and Judgment Mandate was filed with Clerk of trial court on June 19, 1974.

This Notice of Appeal herein was filed August 2, 1974, 44 days after the filing of the Mandate, and almost 10 months after the overruling of the Motion for Judgment NOV. Both the trial court and Court of Appeals held the Motion for Judgment NOV should be overruled (The Court of Appeals stating "we are convinced that—the district court did not err in denying the Appellant's Motion for Judgment n.o.v."), but each court on its own motion held that a new trial should be granted. It has already been determined that the action of the trial court in granting a new trial was void and without jurisdiction. *Peterman v. Chicago, Rock Island and Pacific*, 493 Fed.2d 88.

It now remains to be determined whether the action of the Court of Appeals was erroneous for either one of three reasons;

a. Its grant of a new trial is without jurisdiction because the Defendant's Notice of Appeal was not timely filed, or,

b. Whether Rule 50(d) of the Federal Rules of Civil Procedure is authority for granting an appell*ant* a new trial when the Rule uses the word "appell*ee*", or,

c. It erroneously assigned as error an instruction not objected to by either party.

This case presents a patent violation of FRAP 4A in that a civil appeal was taken after the 30 days time for appeal had expired; without any order extending time for any reason.

The Eighth Circuit Court cites two *criminal* cases in support of their overruling the Petitioners Motion to Dismiss. Both of those were Eighth Circuit Court decisions holding that in a criminal case under the Federal Criminal Rules the Clerk could waive the time by accepting a delinquent criminal appeal. This is an unwarranted extension of that doctrine into the civil area violating FRAP 4A.

It is contrary to all existing civil appellate law the other Circuit Courts of Appeal decisions and the United States Supreme Court.

Pursuant to FRAP 41 and 45, the mandate of the Circuit Court becomes effective after denial of certiorari when it is docketed by the Clerk of the trial court. No further action by the trial court is required. If so, the Notice of Appeal here was filed fourteen (14) days after time for such appeal expired. No order under FRCP 60(b) was obtained extending time for appeal.

In this case the Respondent objected to the giving of an instruction on Last Clear Chance doctrine on the ground that the evidence did not warrant it. The Respondent requested special interrogatories, which were given. No other objections were made. The appeal was taken by the Respondent on the

basis that the evidence did not warrant the instruction and it should have been granted a judgment NOV.

> "The defendant is not here contending that the Interrogatories were improper in form, and is not objecting to the form of Instruction No. 21 on last clear chance . . ." (From page 6 of Plaintiff's Reply Brief, Appendix C, p. A-14).

The Circuit Court overruled those contentions and affirmed the trial court's overruling of Respondent's objection and motion for judgment NOV. It then continued and vacated the judgment due to the form of the instruction given by the trial court; thereby assigning as error an instruction not objected to by the Respondent. A clear contradiction to FRCP 51.

The granting of a new trial was based on the authority of FRCP 50(d). Yet, Rule 50(d) provides as follows:

> "If the motion for judgment notwithstanding the verdict is denied, *the party who prevailed on that motion may, as appellee* (but here, the appellee prevailed on that motion and does not want a new trial) assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court *erred* in denying the motion for judgment notwithstanding the verdict. (But here, the appellate court states that trial court did not err in denying the motion.) If the appellate court reverses the judgment (surely the rule is referring to a reversal of the ruling on judgment notwithstanding the verdict—which ruling was *not* reversed) nothing in this rule precludes it from determining that the appellee (but appellee does not want a new trial) is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted." (Emphasis supplied.)

CONCLUSION

This case involves a considerable number of federal procedural questions and presents an opportunity to the Court to delineate certain procedural rules, set out guidelines and resolve existing differences in the Circuit Courts of Appeal.

Respectfully submitted,

LLOYD E. HUMPHREYS
HUMPHREYS & WARNER
809 Merchants National Bank
Cedar Rapids, Iowa 52401

W. HOWARD SMITH
Attorney at Law
330 First Street SE
P.O. Box 4708
Cedar Rapids, Iowa 52407

APPENDIX

APPENDIX A

United States Court of Appeals for the Eighth Circuit

No. 74-1604

Frank L. Peterman,
Appellee,
v.
Chicago, Rock Island and Pacific Railroad Company,
Appellant.

Appeal from the United States District Court for the Southern District of Iowa.

Submitted: April 14, 1975

Filed: May 6, 1975

Before Matthes, Senior Circuit Judge, Ross and Webster, Circuit Judges.

Matthes, Senior Circuit Judge.

This railroad crossing collision case involves the so-called last clear chance doctrine, which has been viable in Iowa for nearly a century. See list of cases appended to Note, *The Iowa Doctrine of Last Clear Chance*, 34 Iowa L. Rev. 480, 495 (1949). A jury awarded plaintiff Frank L. Peterman $35,000 as damages for injuries he sustained when the converted school bus he was driving was struck by a train owned and operated by the appellant railroad company. The collision occured at a railroad crossing near Tiffin, Iowa.[1]

---

[1] Jurisdiction is based on diversity of citizenship, and the requisite amount in controversy.

I. **Jurisdiction**

As its sole basis for obtaining post-verdict relief, the appellant filed a timely motion for judgment n.o.v. It did not file a motion for new trial pursuant to Rule 59, Fed. R. Civ. P., nor did it seek a new trial as an alternative form of relief to its motion for judgment n.o.v. as authorized by Rule 50(b), Fed. R. Civ. P.

The district court denied the appellant's motion for judgment n.o.v., but sua sponte ordered a new trial. These actions were taken more than 10 days after entry of judgment. *See* Rule 59(d), Fed. R. Civ. P. Thereafter, plaintiff filed a notice of appeal and a petition for writ of mandamus contending that the district court had exceeded its jurisdiction in granting the new trial. After a hearing, we held that the trial court did not have the power to grant sua sponte a new trial more than 10 days after the entry of judgment and issued the writ of mandamus vacating the order granting the new trial. *See Peterman v. Chicago, R. I. & Pac. R. Co.*, 493 F.2d 88 (8th Cir.), *cert. denied*, — U.S. — (1974).

After the Supreme Court's denial of certiorari and this court's subsequent filing of its mandate, the railroad company moved for entry of judgment on the jury's verdict. The district court formally entered the judgment and the railroad company appealed.

Plaintiff has opposed the appellant's appeal contending that the appellant filed its notice of appeal out of time and that, therefore, this court lacks jurisdiction. The parties exhaustively presented this jurisdictional issue in their briefs and at oral argument. All of the proceedings relating to the timeliness of the appeal have been considered in light of the applicable law. From our exploration of the issue, we are led to conclude that we are vested with jurisdiction to consider the merits of the appeal. *See generally United States v. Williams*, 508 F.2d 410

(8th Cir. 1974); *United States v. Mills*, 430 F.2d 526, 527-28 (8th Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971). Accordingly, the plaintiff's motion to dismiss is denied.

II. **The Merits**

The merits of this controversy concern whether plaintiff was entitled to recover under the Iowa last clear chance doctrine. In this respect, the railroad company raises two contentions on appeal. First, it asserts that the evidence was insufficient as a matter of law to warrant submission of the last clear chance doctrine to the jury. Secondly, it contends that the general verdict was inconsistent with the jury's answers to the district court's special interrogatories. In its answers the jury found the plaintiff guilty of negligence that was a proximate cause of the injury. Consequently, the railroad company claims that the district court should have granted its motion for judgment n.o.v.

We consider these issues seriatim.

A. **Sufficiency of the Evidence**

Under Iowa law, the last clear chance doctrine cannot be submitted to the jury unless the evidence is sufficient for the jury to find that the defendant (1) had knowledge of plaintiff's presence, (2) realized or by the exercise of ordinary care should have realized the plaintiff's peril, (3) had the ability to avoid the injury to the plaintiff, and (4) failed to avoid the injury. *See, e.g., Ackerman v. James*, 200 N.W.2d 818, 827 (Iowa 1972); *Albrecht v. Rausch*, 193 N.W.2d 492, 495 (Iowa 1972); *Duffy v. Harden*, 179 N.W.2d 496, 501 (Iowa 1970). The appellant admits that the evidence was sufficient for the jury to find elements (1), (2) and (4). However, it asserts that the third element, the ability to avoid colliding with the plaintiff's vehicle, was not shown. *See Albrecht v. Rausch, supra.*

Specifically, appellant submits that there was no evidence that the train crew had sufficient time to avoid the collision after they knew or should have known that plaintiff was in a position of peril. In considering this position, we observe that our review of the district court's denial of a motion for judgment n.o.v. is severely limited: we must view the evidence in the light most favorable to the plaintiff as the party who prevailed below, giving the benefit of all favorable inferences to him. *See, e.g., Griggs v. Firestone Tire & Rubber Co.*, —F.2d— (8th Cir. 1975); *Hanson v. Ford Motor Co.*, 278 F.2d 586, 596 (8th Cir. 1960).[2]

We do not propose to engage in an extended discussion of the evidence favorable to plaintiff. The transcript has been carefully scrutinized and we are in agreement with Judge Stuart's analysis thereof, which is shown in his memorandum opinion denying the motion for judgment n.o.v. As the district court stated in pertinent part:

> The Court is of the opinion that under the evidence presented, the jury could have found that the train crew saw the bus when the train was about 1000 feet from the intersection. That the bus stopped about 55 feet from the centerline of the railroad track and then proceeded forward in low gear to the point of the accident. A stop sign was attached to a railroad cross buck sign about 35 feet from the centerline of the track. The bus proceeded past the stop sign and cross buck at a speed of about six miles per hour. The train was traveling at a speed of about 55 miles per hour. No effort was made to slow the speed of the train until it was 25 to 100 feet from the crossing. The train hit the back four feet of the bus. The front of the

[2] The Iowa courts follow this same standard of review. *See, e.g., Ackerman v. James, supra,* 200 N.W.2d at 824; *Lynch v. Des Moines Ry. Co.*, 215 Iowa 1119, 1122, 245 N.W.2d 219, 220 (1932), and cases cited therein.

> bus would have had to travel 60 to 65 feet from the cross buck to the point of collision. This would have taken six or seven seconds and would have placed the train about 560 feet away from the crossing when the bus passed the cross buck. The engineer would have had six to seven seconds to slow the train down.

We add only that, in addition to these findings, the review of the transcript reveals that the jury could have found that the crossing was extremely dangerous, since a number of accidents had occurred at the crossing in the past, and that the train engineer knew of this hazardous condition.

In light of these facts, we can only conclude that the evidence was sufficient for the district court to submit the last clear chance doctrine to the jury. We cannot agree with the appellant that those Iowa cases that have allowed train crewmen to rely on the custom of travelers to drive up to the tracks before stopping require an opposite result.[3] The application of that custom is precluded by the particular facts in this case, which show that the engineer was aware that the crossing was hazardous and that the crewmen observed the plaintiff proceed into the crossing without stopping at the stop sign and cross bucks. *See Tilghman v. Chicago & Nw. Ry. Co.*, 253 Iowa 1339, 1344, 115 N.W.2d 165, 170 (1962). *See also Strom v. Des Moines & Cent. Iowa Ry. Co., supra,* 248 Iowa at 1062, 82 N.W.2d at 787.

Under these circumstances, the following statement from *Tilghman v. Chicago & Nw. Ry. Co., supra,* 253 Iowa at 1346, 115 N.W.2d at 169-70, is convincing:

> It was not necessary, in order to avoid the collision, to stop the train before it reached the crossing. If its speed

[3] *See, e.g., Strom v. Des Moines & Cent. Iowa Ry. Co.*, 248 Iowa 1052, 82 N.W.2d 781 (1957); *Arp v. Illinois Cent. R. Co.*, 230 Iowa 869, 299 N.W. 413 (1941); *Williams v. Mason City & Ft. D. Ry. Co.*, 205 Iowa 446, 214 N.W. 692 (1927). *See also Mast v. Illinois Cent. R. Co.*, 79 F. Supp. 149, 163 (N.D. Iowa 1948).

had been reduced just a little or a little sooner plaintiff could have crossed the railroad track in safety. If the train had reached the crossing just one second later than it did this collision would have been avoided. At least the jury could properly find. As it was, the truck [here bus] was partly across the track when it was struck without substantial reduction in the train's speed. * * *

The fact the trainmen may not have had time, after realization of plaintiff's peril to stop the train does not prevent operation of the last clear chance doctrine where the evidence indicates that had they checked the speed of the train it would have enabled plaintiff to clear the crossing.

Thus, as the district court held:

> The jury could have found (1) the train crew should have realized plaintiff did not know this train was approaching because he drove past the cross buck and (2) as reasonable men they should have, at that time, taken steps to slow down the train and (3) action at that time would have avoided the collision. Tilghman v. Railway, supra, at 1347.

We therefore hold that the evidence was sufficient for the court to submit the last clear chance doctrine to the jury.

B. **Jury Instructions**

Prior to delineating the elements of the last clear chance doctrine, the district court in the prelude to Instruction No. 21 informed the jury:

> Even if you have found the plaintiff, Frank L. Peterman, guilty of negligence *which was a proximate cause of the collision* he might still recover under the doctrine of last clear chance.

(Emphasis supplied.) Special interrogatories were requested by the appellant. The district court, in response to the request drafted special interrogatories, which with the jury's answers are here set out:

SPECIAL INTERROGATORIES

1. Was the defendant railroad company guilty of negligence which was the proximate cause of the collision and resulting injuries and damages?

Yes X

No . .

2. Was the plaintiff guilty of negligence which was a proximate cause of the collision and resulting injuries and damages?

Yes X

No . .

3. If the answer to the second interrogatory is yes, did the defendant railroad have the Last Clear Chance to avoid the collision?

Yes X

No . .

The instructions and the interrogatories make it apparent that the district court was of the view that even if plaintiff's negligence was a proximate cause of the collision, he could nevertheless recover upon the additional finding that the appellant railroad company had the last clear chance to avoid the collision. Appellant objected to the form of the instructions and interrogatories at trial, and it now vigorously contends that, under the latest pronouncement of the Supreme Court of Iowa in *Ackerman v. James, supra,* the plaintiff cannot recover since the trier of fact found that plaintiff's negligence was a proximate cause of his injury.

Our research indicates that for a number of years the Iowa authorities were split over the theory underlying the last clear chance doctrine. Some cases regarded the doctrine as an exception to the rule that contributory negligence is a complete bar to recovery. *See, e.g., Lynch v. Des Moines R. Co.*, 215 Iowa 1119, 245 N.W. 219 (1932); *Keefe v. Chicago & Nw. R. Co.*, 92 Iowa 132, 60 N.W. 503 (1899). Other cases considered the doctrine as a phase of proximate cause. *See, e.g., Albrecht v. Rausch, supra,* 193 N.W.2d at 495; *Vreugdenhil v. Kunkel,* 256 Iowa 460, 127 N.W.2d 630 (1964); *Groves v. Webster City,* 222 Iowa 849, 270 N.W. 329 (1936); *Albrecht v. Berry,* 202 Iowa 250, 208 N.W. 205 (1926).[4]

The difference in theories was resolved and the dispute laid to rest in the *Ackerman* case, where the Supreme Court of Iowa, in quoting Justice Brennan, then a Justice of the New Jersey Supreme Court,[5] explicitly held that:

> "[T]he best considered decisions properly catalogue the alleged last clear chance doctrine as simply an application of the principle of proximate cause."

200 N.W.2d at 829.[6]

---

[4] The author of the Note, *The Iowa Doctrine of Last Clear Chance,* in 34 Iowa L. Rev., *supra* at 481, observes:

> Despite the large number of cases in which the Iowa Supreme Court has addressed itself to the last clear chance doctrine, its basis and legal theory is not at all settled. Parallel lines of authority support two theories. One line bottoms the doctrine on the theory of proximate cause. [Citing cases.] * * * The other line of authority views the doctrine as an exception to the contributory negligence rule. [Citing cases.]

[5] Quote from *Pangborn v. Central R. Co. of New Jersey,* 18 N.J. 84, 101, 112 A.2d 705, 713 (1955).

[6] The *Ackerman* Court also held that the viability of the last clear chance doctrine was not affected by the recent amendment to § 619.17 of the Iowa Code Annotated, which now places on the defendant the burden of proving that the plaintiff was guilty of contributory negligence, whereas previously the plaintiff was required to prove freedom from contributory negligence.

In the process of delineating the proximate cause theory, the *Ackerman* Court borrowed extensively from Justice Brennan's decision in *Pangborn.* The *Ackerman* Court was influenced by the following language from *Pangborn*:

> * * * The question with respect to negligent conduct on the part of the person injured through the negligence of another as affecting the former's right to recover thus becomes resolved in every case into one as to whether or not that conduct of his was a proximate cause of the injury. If it was, then the contributory negligence rule is applicable, and the plaintiff will by its operation be barred from recovery. * * * It follows that the decisive question, in each case where a plaintiff injured is found to have been at fault in the premises from his failure to exercise the required degree of care, resolves itself into one as to whether that fault was or was not a proximate cause of the injury, and that the answer to that question will infallibly determine whether or not it will bar a recovery.

18 N.J. at 101, 112 A.2d at 714, *quoted in Ackerman, supra,* 200 N.W.2d at 830.

With these considerations in mind, the *Ackerman* Court held:

> We hold in a personal injury case where the injured party has alleged facts essential to the application of the doctrine of last clear chance as a theory of recovery evidence relating to those facts is admissible as relevant to a determination of the issue of proximate cause. This is so whether the issue relates to defendant's negligence being a proximate cause of plaintiff's injury or to plaintiff's negligence being a bar to his recovery. . . .
>
> It would follow that if the trier of fact finds plaintiff's negligence was a proximate cause of his injury, he cannot recover. On the other hand, a finding that defendant's

> negligence was the *sole* proximate cause of the injuries would be justified where such trier finds plaintiff's negligent conduct placed him in a position of peril and further finds defendant, with knowledge of plaintiff's presence on the highway, failed to use ordinary care in exercising the ability at his command to avoid striking plaintiff after he realized or in the exercise of ordinary care should have realized the plaintiff's perilous position.

200 N.W.2d at 830

Confronted with the Iowa Supreme Court's unequivocal pronouncement, we are not persuaded by plaintiff's argument that the answers to the special interrogatories should be read to mean that the jury found that appellant's negligence was the *sole* proximate cause of the collision However, we also are not convinced by the railroad company's argument that the jury's affirmative answer to Special Interrogatory No. 2 requires a holding that the plaintiff cannot recover. Since Instruction No. 21 and the special interrogatories were not phrased in the theory of proximate cause, legal conclusions based on the holding in *Ackerman* cannot apply. Thus the dichotomous interpretations that the answers to the special interrogatories can be given make it impossible for us to determine the jury's state of mind.

Judge Stuart, who presided over the trial of this case, was equally troubled over the phraseology of the instructions and the special interrogatories. In his memorandum denying appellant's motion for judgment n.o.v. and sua sponte granting a new trial, Judge Stuart stated:

> It is therefore apparent that instructions 21 and 22 contain erroneous statements of the law and that under the correct law the general verdict is contrary to the jury's answer to interrogatory number 2.
>
> * * * It would not be fair or in the interest of justice to grant a judgment NOV because of the conflict between the general verdict and the special interrogatory in view of the erroneous instructions given. More properly the jury should have been told that plaintiff could recover even if he had been negligent if defendant's negligence intervened between his negligence and the collision and became the sole proximate cause thereof.[7]

Therefore, we hold that the case was improperly submitted since the law, as established in *Ackerman*, was not properly delineated.

III. **Remedy**

We are convinced that even though the instructions and the special interrogatories were erreoneous, the district court did not err in denying the appellant's motion for judgment n.o.v. Rather, we agree with the appellant that we should grant alternative relief by remanding the case for a new trial. Rule 50(d), Fed. R. Civ. P., does not prohibit this court from taking this action. Indeed, the rule provides: "If the appellate court reverses the judgment, nothing in this rule precludes it from determining that appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted." *See Slaughter v. Philadelphia National Bank*, 417 F.2d 21, 33 n.22 (3d Cir. 1969). *See also Neely v. Eby Construction Co.*, 386 U.S. 317, 323-324, 329 (1967). *Cf. Weade v. Dishman Co.*, 337 U.S. 861 (1949).

Inasmuch as the district court has previously determined that the case should be retried, we decline to remand to permit that court to again decide the question. We conclude that in the interest of justice the judgment of the district court should be

---

[7] Unfortunately, the granting of the new trial by the district court on its own initiative was untimely. This precipitated the mandamus proceeding.

vacated and the cause remanded to the district court for a new trial under appropriate instructions.

The costs shall be taxed equally between the parties. It is so ordered.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

United States Court of Appeals for the Eighth Circuit

74-1604 September Term, 1974

Frank L. Peterman, Appellee, vs. Chicago, Rock Island and Pacific Railroad Company, Appellant.	Appeal from the United States District Court for the Southern District of Iowa.

Petition of appellee for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

May 28, 1975

APPENDIX C

Reply Brief—Chicago, Rock Island & Pacific Railroad Company, Appellant, United States Court of Appeals No. 74-1604.

It should be noted that *Bruggeman*, upon which the plaintiff so heavily relies, has not been cited in Iowa for twenty years. It was last cited in *Menke v. Peterschmidt*, 246 Iowa 724, 65 NW2d 69, and there only to point out the "confusion in the underlying theory of the last clear chance doctrine in Iowa." There the Supreme Court said "The underlying theory upon which the doctrine rests is in some confusion. We have said at times it is an exception to the rule barring recovery to one who has been guilty of contributory negligence. (citing cases, including *Bruggeman*). More often, we have held to the causation theory as the real support for the rule . . ." Prior to that, *Bruggeman* was last cited in *Groves v. City*, 222 Iowa 849, 270 NW 329 (1937), and there only for the elements of the doctrine, not in support of the discredited underlying theory for last clear chance. The "confusion" in the Iowa cases, largely caused by *Bruggeman* and a few kindred cases, has been resolved by *Ackerman*.

Apparently plaintiff believes that the Jury's afiirmative Answer to Interrogatory No. 1 is tantamount to finding that defendant's negligence was the sole proximate cause of the collision and that, therefore, plaintiff can recover even under the proximate cause theory of negligence. The problem with this argument is that although Interrogatory No. 1 found that defendant's negligence was the proximate cause of the collision, Interrogatory No. 2, answered after Interrogatory No. 1, found that plaintiff's negligence was *a proximate cause* of the collision. In Iowa, where the plaintiff's negligence is *a proximate cause* of the collision, he cannot recover. *The defendant is not here contending that the Interrogatories were improper in form,*

and is not objecting to the form of Instruction No. 21 on last clear chance, it is simply contending that the Answer to Interrogatory No. 2 that plaintiff was guilty of negligence which was a proximate cause of the collision defeats his recovery under the Iowa last clear chance doctrine. (Emphasis added) Plaintiff is simply attempting to confuse the issue by arguing about the * * *